COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

ATTORNEY-CLIENT PRIVILEGED

MEMORANDUM

TO: Members of the Virginia Board of Health

FROM: Allyson K. Tysinger
Senior Assistant Attorney General

DATE: September 12, 2012

SUBJECT: Legal Representation of Board Members

Department of Health staff has made our Office aware of questions posed by Board members over the last two weeks. Through this memorandum, we are providing legal advice to you to address those questions. We bope that this information will be helpful to you in preparation for the upcoming meeting. As always, please do not hesitate to contact me if you have additional questions or would like further clarification.

Can the Board receive legal advice from attorneys other than those with the Office of the Attorney General?

Pursuant to Virginia Code § 2.2-507, all legal service in civil matters for every state board shall be rendered and performed by the Attorney General. Virginia Code § 2.2-510 does give discretion to the Governor or the Attorney General to employ special counsel for a state entity but only upon: i) a determination by the Governor that the Office of the Attorney General is unable to render legal service; ii) the written recommendation of the Attorney General that it is impracticable or uneconomical for the Attorney General to provide legal service; or, iii) the Attorney General's certification that it would be improper due to a conflict of interest for his Office to provide legal services or that he is unable to provide legal services. None of the prerequisites to the employment of special counsel have been met that would permit the Governor or the Attorney General to appoint special counsel for the Board at this time. Thus, while the Board may receive comments from members of the public, including attorneys, legal advice is rendered to the Board only by the Office of the Attorney General.

Information obtained by Board members from private attorneys may be considered as public comment. Such information cannot be considered as legal advice provided to the Board member within the scope of his official duties and will not enjoy the protection of the attorney-client privilege.

Are Board members required to follow the advice of the Attorney General?

As is the case with any state entity represented by the Office of the Attorney General, Board members may refuse to follow the advice of the Attorney General. Should a Board member choose to disregard the Attorney General's advice and subsequently be named in a lawsuit related to the particular Board action taken, such as the recent litigation challenging the certificate of public need program which named every Board member as an individual defendant, the Attorney General is not obligated to provide representation and it is within the discretion of the Attorney General to decline both representation of the Board member and the appointment of special counsel. *See* Virginia Code §§ 2.2-507 and 2.2-510. Such decisions are made on a case-by-case basis. In a case where the Office of the Attorney General declines to represent a Board member because of the member's refusal to follow legal advice, it would be the responsibility of the Board member to obtain and pay for his or her own legal representation if representation was desired.

Can the Office of the Attorney General "veto" the Board's decisions?

The Office of the Attorney General cannot "veto" a policy decision made by the Board within its statutory authority. Pursuant to Virginia Code § 2.2-4013(A) of the Administrative Process Act and Executive Order 14 issued by Governor McDonnell, the Attorney General is required to review all regulations to ensure statutory authority for the proposed regulations. With respect to the *Regulations for Licensure of Abortion Facilities*, the Office of the Attorney General concluded that the Board exceeded its statutory authority in adopting section 12 VAC 5-412-370 and therefore, did not certify the regulation package. Without certification from the Attorney General, a regulation cannot move forward in the regulatory process. *See* Executive Order 14.

Can the General Assembly delegate rule-making authority to the Board?

It is well-established that the General Assembly, through statute, may expressly authorize an agency to make regulations. *See e.g.* 85-86 Op. Va. Att'y Gen. 241 (General Assembly gave the Board of Examiners for Audiology and Speech Pathology the authority and duty to adopt regulations for issuance of temporary permits). In adopting regulations, the Board must not exceed the delegation of authority granted by the General Assembly. *See* 82-83 Op. Va. Att'y Gen. 654, 655 (without express grant of statutory authority to promulgate regulations for issuance of temporary permits, Board of Veterinary Medicine had no power to do so). In addition, Virginia Code § 1-248 states that any regulation shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth. If a regulation is inconsistent with state law, it exceeds the authority of the entity that adopted it. *See Brown v.*

United Airlines, Inc., 34 Va. App. 273, 276 (2001) (holding that authority to make rules and regulations does not permit the Workers' Compensation Commission to adopt rules that are inconsistent with the Workers' Compensation Act).

Can the Board adopt a grandfather provision that would exempt entities currently operating that now meet the definition of an "abortion facility" from the minimum standards adopted by the Board pursuant to § 32.1-127.001?

No. Chapter 670 of the 2011 Virginia Acts of Assembly (codified at Virginia Code § 32.1-127) mandates that facilities in which five or more first trimester abortions per month are performed shall be classified as a category of hospital. Virginia Code § 32.1-127 requires the Board to promulgate regulations that include minimum standards for, among other things, the construction and maintenance of hospitals to assure the environmental protection and the life safety of its patients, employees, and the public. Virginia Code § 32.1-127.001 further requires that:

> "[n]otwithstanding any law or regulation to the contrary, the Board of Health shall promulgate regulations pursuant to § 32.1-127 for the licensure of hospitals and nursing homes that shall include minimum standards for the design and construction of hospitals, nursing homes, and certified nursing facilities consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities issued by the American Institute of Architects Academy of Architecture for Health."

The language of both § 32.1-127 and § 32.1-127.001 is clear and unambiguous. The General Assembly did not provide for an exemption from licensure, or an exemption from meeting minimum standards for design consistent with the Guidelines for Design and Construction of Hospital and Health Care Facilities, for entities that have currently been operating but are now subject to regulation pursuant to Chapter 670 of the 2011 Acts of Assembly. As noted by the Virginia Supreme Court, "[a]mendments of the statutes or exceptions thereto can only be added by the legislature and not by the courts or the administrative officers of the State." *See Hancock Co., Inc., v. Stephens*, 177 Va. 349, 356 (1941); *City of Richmond v. County of Henrico*, 185 Va. 176, 189 (1946).

Similarly, in specifically reviewing a grandfather clause set forth in statute and an agency's ability to unilaterally modify the grandfather clause, the Virginia Supreme Court stated:

> "[w]hile it may be, as the Commission maintains, that public convenience and necessity would be better served by affording grandfather protection to sight-seeing carriers by boat limited to the extent of their operations on January 1, 1968, such a limitation is not dictated or permitted by the clear language of the statute. The statute makes no exception and has no qualification."

Tbe Court concluded that both it and the Commission were without authority to modify the grandfather clause. It follows that if a grandfather clause cannot be modified by other than the legislature, then one surely cannot be created by other than the legislature.

It should also be noted that our Office has consistently advised that all abortion facilities, whether operating prior to July 1, 2011, or not, that perform five or more first trimester abortions per month must now apply for a license and will be considered new licensed facilities. Prior to July 1, 2011, such entities were considered to be physicians' offices, and were only considered to be abortion facilities when Chapter 670 of the 2011 Acts of Assembly became effective. Thus, entities that were in existence and operating prior to July 1, 2011, and that are now considered to be abortion facilities subject to licensure are not entitled to special treatment based on the mere fact of their pre-existence, and therefore must meet the same requirements as an abortion facility that began operations after July 1, 2011.